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No. 89-1436

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

R. ENTERPRISES, INC., AND MFR COURT STREET BOOKS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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The court of appeals held that before the government may enforce compliance with a grand jury subpoena for corporate business records, it must establish that the subpoenaed materials would be "relevan[t]" and "admissible as evidence at trial." Pet. App. 10a. The court emphasized that unless grand jury subpoenas are held to such a strict threshold standard, they might be used as "a means of discovery in addition to that provided by Fed. R. Crim. Pro. 16." *Id.* at 9a. Applying that standard, the court quashed the subpoenas for respondents' corporate records. It concluded that the subpoenaed materials "would most likely be inadmissible on relevancy grounds at any trial that might occur," and that the records would therefore "fail to meet the requirement[ ] that any documents subpoenaed under

Rule 17(c) must be admissible as evidence at trial." *Id.* at 10a.

In our petition, we explained that the decision below cannot be squared with this Court's cases involving the role and functions of the grand jury. Moreover, we stated, the court of appeals' decision is in conflict with both the majority rule in the circuit courts (according to which the government need not make *any* preliminary showing of relevance in order to secure compliance with a grand jury subpoena), as well as with a minority rule (which imposes a modest threshold requirement on the government). Because the court of appeals' novel standard also threatens to disrupt routine grand jury investigations—as the present case vividly illustrates—the petition for a writ of certiorari should be granted.

1. We restate the court of appeals' decision because respondents evidently have no desire to defend it on its own terms. Instead, respondents defend a very different principle—one never articulated by the court below.

This is how respondents describe the "rule announced by the Fourth Circuit": "[w]hen a subpoena, seeking records related to activities protected by the First Amendment, is challenged on the grounds that the documents sought are unrelated to the criminal investigation, the Government is obliged to make a showing that [the] records demanded are 'substantially' related to the grand jury investigation." Br. in Opp. 6. The short answer is that the court of appeals announced no such rule. What the court said is that "any documents subpoenaed under Rule 17(c) must be admissible as evidence at trial." Pet. App. 10a. The court then applied that rule in deciding to quash the subpoenas in this case—finding that the subpoenaed materials "would most likely be inadmissible on relevancy grounds at any trial that might occur." *Ibid.* Respondents do not quote the court's actual language, let alone explain how that language can

be squared with respondents' quite different rendition of the decision below.

Respondents misread the court of appeals' decision in a second respect. As respondents view it, the rule adopted by the court of appeals applies only to subpoenas for records "related to activities protected by the First Amendment." Br. in Opp. 6. But the court of appeals did not confine its holding in that fashion. What the court said is that "any" record subpoenaed by the grand jury—whether or not "related" to First Amendment activity—"must be admissible as evidence at trial." Pet. App. 10a. The court of appeals' decision therefore sweeps quite broadly, and cannot on its face be confined in the way respondents suggest.

2. In any event, First Amendment principles do not support the court of appeals' decision—even if, as respondents contend, the decision could be confined to subpoenas for records related to activities protected by the First Amendment. In the first place, respondents do not explain why the First Amendment provides *any* protection to routine corporate records (as opposed to the actual videotapes).[1] Although respondents assert that the subpoenas will "inevitably chill the exercise of free expression" (Br. in Opp. 9), they offer no support for that prediction. And "[b]are

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[1] Cf. *United States* v. *Coates*, 692 F.2d 629, 633-634 (9th Cir. 1982) (Internal Revenue Service summons for corporate minute books of a church results in only an incidental burden on religion and is therefore enforceable); *United States* v. *Grayson County State Bank*, 656 F.2d 1070, 1073-1074 (5th Cir. 1981) (IRS summons for bank records of a church did not impermissibly chill the exercise of religion), cert. denied, 455 U.S. 920 (1982); *United States* v. *Freedom Church*, 613 F.2d 316, 320 (1st Cir. 1979) (IRS summons to church pastor for books of account, bank records, and lists of contributors upheld against free exercise and free association claims). Because the subpoenas at issue in this petition sought only routine corporate records—and not the actual videotapes—the cases cited by respondents at page 7 n.6 of their brief in opposition do not apply.

allegations of possible first amendment violations are insufficient to justify judicial intervention into a pending investigation." *Dole* v. *Milonas*, 889 F.2d 885, 891 (9th Cir. 1989).

What is more, even if the First Amendment were applicable to respondents' corporate books and records, it would not insulate respondents from the duty to respond to a grand jury subpoena. As this Court explained in *Branzburg* v. *Hayes*, 408 U.S. 665, 682 (1972), "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."[2] Applying that principle, the Court in *Branzburg* held that the First Amendment does not shield a reporter from having to answer a grand jury's questions concerning an ongoing criminal investigation. See also *New York* v. *P.J. Video, Inc.*, 475 U.S. 868 (1986) (no special exemption for video store from the probable cause standard for search warrants); *Herbert* v. *Lando*, 441 U.S. 153 (1979) (no special exemption for the media from the general rules of pretrial discovery); *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978) (no special immunity for the press from search warrants); *SEC* v. *McGoff*, 647 F.2d 185 (D.C. Cir.), cert. denied, 452 U.S. 963 (1981) (upholding subpoena issued by the Securities and Exchange Commission for corporate records relating to transactions with South Africa); *In re Grand Jury Matter (Gronowicz)*, 764 F.2d 983, 989 (3d Cir. 1985) (Garth, J., concurring), cert. denied, 474 U.S. 1055 (1986).

[2] Respondents contend (Br. in Opp. 6) that in *Branzburg* this Court "held" that whenever "a grand jury investigation impinges upon activities protected by the First Amendment, * * * a prosecutor must show that there is 'a substantial relation between the information sought and a subject of overriding and compelling state interest.' " In fact, *Branzburg* holds no such thing. Instead, the Court, noting that some of its prior cases had adopted a strict standard for "even an indirect burden on First Amendment rights," explained that the subpoena in *Branzburg* met that standard, *assuming* it was applicable. 408 U.S. at 700. Respondents give a very misleading characterization of the Court's opinion in *Branzburg* by omitting the first several words of the very sentence that they quote from the case: "*If the test is that* the government 'convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest,' * * *." *Ibid.* (emphasis added).

3. Respondents contend that by showing that R. Enterprises, Inc., and MFR Court Street Books, Inc., did no business in Virginia (Br. in Opp. 5), respondents demonstrated that the subpoenaed records bore "no conceivable relevance to any legitimate 'investigation' " (*id.* at 12). Having made that initial showing, respondents assert, the burden shifted to the government to "make a minimal showing of relevanc[e]"—a burden which, in respondents' view, the Government failed to carry. *Ibid.* That contention is mistaken for two reasons.

First, respondents once again defend a legal standard different from the one actually adopted by the court of appeals. As noted, the court of appeals imposed *on the government* the initial burden to prove that the subpoenaed materials would be relevant and admissible *at trial*. The court did *not* hold that the government's burden is triggered only when the target of the subpoena first demonstrates that the subpoenaed material "bears no conceivable relevance to any legitimate 'investigation.' " Br. in Opp. 12. The latter standard—which respondents derive (see *ibid.*) from *In re Grand Jury Subpoena (Battle)*, 748 F.2d 327 (6th Cir. 1984), and *In re Liberatore*, 574 F.2d 78 (2d Cir. 1978)—constitutes, as we noted in our petition (at 13-15), the majority rule among the circuits. Significantly, however, that was *not* the rule applied by the court of appeals. There is therefore no reason to suppose that the majority of circuits

would "fully support the Fourth Circuit's conclusion" in this case. Br. in Opp. 12.[3]

Second, and in any event, respondents did not demonstrate that the subpoenaed records bear no conceivable relevance to the grand jury investigation. Although respondents asserted, by affidavit, that R. Enterprises and MFR Court Street Books conducted no business in Virginia, the grand jury was not required to accept that assertion on faith. See *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950) (the grand jury "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not"). Moreover, even if respondents transacted no business in Virginia, that would not render the subpoenaed records irrelevant to the grand jury investigation. At a minimum, the records might demonstrate a pattern and practice of obscenity violations, including out-of-state violations, and thus constitute evidence of knowledge and intent on the part of Martin Rothstein – who, as the district court found, owned not only the respondent companies but also Model Magazine, which *did* conduct business in Virginia. See Pet. App. 60a.

4. The actual holding of the court of appeals not only conflicts with decisions of this Court and of other courts of appeals, but also threatens to "saddle [the] grand jury with minitrials and preliminary showings" that will "assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973). The history of this case provides an excellent illustration of that danger. The subpoenas to R. Enterprises and MFR Court

[3] Although respondents speculate that the majority of circuits would "fully support the Fourth Circuit's conclusion" in this case (Br. in Opp. 12), respondents do not dispute the fact that the *legal standard* applied by the court below is in sharp conflict with the majority rule.

Street Books were first issued in April 1988. More than two years later, respondents have yet to produce the required documents. The court of appeals' decision strongly encourages such delaying tactics, and should be reversed.

For the foregoing reasons and those stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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